

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH THOMAS EPLETT,

Defendant-Appellant.

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UNPUBLISHED

May 18, 2010

No. 293255

Macomb Circuit Court

LC No. 2009-000372-FH

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order granting the prosecution's motion to reinstate a charge for second-degree murder, MCL 750.317, against defendant. We affirm.

Defendant was charged with one count of open murder, MCL 750.316, and one count of felony-firearm, MCL 750.227b. These charges arose from the shooting death of Paul Gorinski in the early morning hours of November 1, 2008. Defendant was interviewed by Warren Police Detective Randy Costanzo after the shooting. After it became clear that defendant was the person that shot Gorinski, he was interviewed a second time and this interview was recorded. At defendant's preliminary examination, Detective Costanzo testified as to the substance of defendant's statement as follows. At the time of the shooting defendant lived in a 2-bedroom apartment in Warren; his mother, Mary Harder, lived with him. Defendant was alone in his bedroom, at approximately 3:00 a.m., when he heard the door to his apartment open. Harder had gone out that night, so he expected that she was returning home. He then heard a man's voice in the apartment. Concerned about a possible burglary, he retrieved a pistol as a precaution and looked out of his bedroom. He saw a man he did not know sitting in the living room and heard Harder in the bathroom. He came out of his bedroom and introduced himself to the man, who turned out to be Gorinski.

Both Gorinski and Harder appeared to have been drinking and were quite loud. Defendant was very angry at Harder because she was not supposed to drink due to medication she was taking. Harder and Gorinski continued being excessively loud; defendant came out of his room and asked them to be quiet so as not to disturb the neighbors. He then went back into his room. Some time later, defendant came out of his bedroom a second time and told Harder that she and Gorinski would have to leave because they were being too loud. Gorinski told defendant that he could not talk to Harder that way and struck defendant in the face. Defendant

returned to his room to get his gun. Gorinski did not follow him. Defendant stepped back into the hall and racked the weapon to ensure that there was a fresh round in the chamber, and to try to intimidate Gorinski. Defendant held the gun by his side in his left hand; he did not point the gun at Gorinski. Gorinski came down the hall towards defendant. Defendant told Gorinski that he had a gun. Gorinski grabbed defendant's right arm and forced defendant backwards into Harder's room.<sup>1</sup> Gorinski began to punch defendant in the head and back and grabbed at defendant's throat. Defendant still had the gun in his left hand, but he was not trying to shoot Gorinski. Gorinski reached for defendant's gun. When he did so, defendant "just decided to shoot," and he did so twice; one of the shots struck Gorinski.

Following the preliminary examination, the district court bound defendant over on the charge of manslaughter, MCL 750.321, and felony-firearm and dismissed the open murder charge. The district court concluded that the prosecution failed to establish probable cause to bind defendant over on a charge of second-degree murder, because there was insufficient evidence presented that defendant knowingly created a high risk of death by bringing a gun into the confrontation with Gorinski. Thereafter, the prosecution filed a motion to reinstate the second-degree murder charge with the circuit court. The circuit court granted that motion.

Defendant argues on appeal that the trial court erred by finding that the district court abused its discretion in dismissing the murder charge against defendant. We disagree. This Court reviews a district court's bindover decision for an abuse of discretion. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). Moreover, this Court reviews a circuit court's decision regarding whether to quash a bindover or reinstate a charge to see if it was consistent with the district court's exercise of discretion; a circuit court decision to reinstate a charge will be upheld if the district court abused its discretion in refusing to bind over. *Id.* An abuse of discretion occurs when the court chooses an outcome which falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

A magistrate should bind over a defendant for trial if it appears that a felony was committed and there is probable cause for charging the defendant. MCL 766.13; *Hudson*, 241 Mich App at 277. Probable cause requires a lower quantum of proof than beyond a reasonable doubt and exists when there is evidence sufficient to cause "a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the [defendant's] guilt" even if he or she has some reservations. *Hudson*, 241 Mich App at 277, quoting *People v Justice*, 454 Mich 334, 344; 562 NW2d 652 (1997). To bind over a defendant on a charge following a preliminary examination, the magistrate must find that there is direct or circumstantial evidence regarding each element of the crime charged. *Hudson*, 241 Mich App at 278. The magistrate must consider mitigating evidence, including evidence of provocation, and also consider the weight and competency of the evidence as well as the credibility of the witnesses. *People v Neal*, 201 Mich App 650; 506 NW2d 618 (1993). If the evidence conflicts or raises a reasonable doubt

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<sup>1</sup> The evidence presented at the preliminary examination indicated that Gorinski was six feet four inches tall and weighed approximately 240 pounds whereas defendant is approximately five feet seven inches tall and weighs about 145 pounds.

regarding guilt, the magistrate must bind over the defendant and leave the issue for the fact-finder at trial. *Hudson*, 241 Mich App at 278.

The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without lawful justification or excuse. MCL 750.317; *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). “Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice may be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). Malice may also be inferred from the use of a deadly weapon. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004). The facts and circumstances of a killing may give rise to an inference of malice; whether malice may be inferred from the evidence is a question of fact for the jury. *People v Flowers*, 191 Mich App 169, 176-177; 477 NW2d 473 (1991).

We find that the prosecution established probable cause that defendant acted with malice when he shot the victim. Intentionally pulling the trigger of a semi-automatic gun twice in close proximity to another person amounts to a wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. This is especially true given that the decedent was unarmed and that defendant introduced a firearm into his confrontation with Gorinski.

Defendant argues, however, that his actions were justified or excused, because the evidence presented at the preliminary examination indicated that defendant fired the gun out of an honest and reasonable belief that his life was in danger. The Self-Defense Act governs whether defendant was justified in his actions. It provides:

Sec. 1. (1) An individual who uses deadly force . . . in compliance with section 2 of the self-defense act and who has not or is not engaged in the commission of a crime at the time he or she uses that deadly force . . . commits no crime in using that deadly force . . . .

(2) If a prosecutor believes that an individual used deadly force . . . that is unjustified under section 2 of the self-defense act, the prosecutor may charge the individual with a crime arising from that use of deadly force . . . and shall present evidence to the judge or magistrate at the time of warrant issuance, at the time of any preliminary examination, and at the time of any trial establishing that the individual’s actions were not justified under section 2 of the self-defense act. [MCL 780.961.]

Section 2 of the Self-Defense Act provides:

Sec. 2. (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual. [MCL 780.972.]

To be entitled to the defense of self-defense, defendant must have acted out of an honest and reasonable belief that the use of deadly force was necessary to prevent his imminent death or imminent great bodily harm. *Id.* An individual still may not use any more force than is necessary to defend himself. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). And, an individual who is the initial aggressor may not later claim self-defense. *Kemp*, 202 Mich App at 323.

Considering the testimony presented at the preliminary examination, we agree that, certainly, a fact-finder could conclude that defendant acted with an honest and reasonable belief that shooting Gorinski was necessary to prevent his own death or great bodily harm under the facts and circumstances presented, including Gorinski's substantial size advantage and the nature of the altercations between the men to that point. However, a reasonable fact-finder could also conclude, from the testimony presented at the preliminary examination, that defendant did not act with such a belief, but rather, that he "just decided to shoot" Gorinski for another reason, such as out of anger. Defendant indicated to Detective Costanzo that he was very angry at Harder for being intoxicated, and that he was angry at Harder and Gorinski for being excessively loud. Further, Gorinski did not follow defendant into his bedroom or continue the altercation after defendant returned to his bedroom. Thus, a fact-finder could conclude that it was defendant who continued, or reinitiated, the altercation by retrieving a gun and returning from his bedroom to confront Gorinski prior to the shooting. On this record, then, defendant's intent and whether he possessed an honest and reasonable belief that the use of deadly force was necessary to prevent his imminent death or imminent great bodily harm when he shot Gorinski, presented questions of fact which the district court improperly decided when it refused to bind defendant over on a charge of second-degree murder. This impermissible usurpation of the jury's exclusive function as the finder of fact was not within the range of principled outcomes available to the district court. Keeping in mind that a defendant is to be bound over upon evidence sufficient to cause "a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the [defendant's] guilt" even if he or she has some reservations, *Hudson*, 241 Mich App at 277, we conclude that the prosecution presented sufficient evidence to bind defendant over on second-degree murder charges, and the district court abused its discretion by concluding otherwise.

We affirm.

/s/ Richard A. Bandstra  
/s/ Stephen L. Borrello  
/s/ Douglas B. Shapiro